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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HENRY E. DRUM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (pp. 19–32, *infra*) is not yet reported. The report of the Interstate Commerce Commission (pp. 34–60, *infra*) is reported at 79 M.C.C. 403.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398 and 2321–2325 to vacate, set aside, and annul an order of the Interstate Commerce Commission. The order of the three-judge district court was entered on August 13, 1960 (p. 33, *infra*). The United States and the Interstate Commerce Commission filed notices of appeal in the district court on October 12, 1960. The

jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1.

STATUTES INVOLVED

Sections 203 and 209(a) of the Interstate Commerce Act (49 Stat. 544, 552, as amended, 49 U.S.C. 303, 309(a)) provide in part as follows:

> SEC. 203(a). *Definitions.*
>
> As used in this part—
>
> • • • • •
>
> (15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.
>
> • • • • •
>
> (17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale,

lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 203(c). Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

* * * * *

SEC. 209(a)(1). Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * *.

QUESTION PRESENTED

Whether transportation of a shipper's goods by motor vehicles driven and maintained by their owners, upon terms by which the shipper pays only a fixed

charge per mile for transportation actually performed and the owner-operators assume all the financial risks of engaging in transportation, constitutes "transportation * * * for compensation" performed by the owner-operators, subject to economic regulation under the Interstate Commerce Act, or private carriage performed by the shipper which is exempt from such regulation.

STATEMENT

1. Oklahoma Furniture Co. ("Oklahoma") transports a substantial part of its freight via trailers pulled by leased tractors. It leases the tractors from the owners and then employs the owners to operate them. It leases only one vehicle from each owner-operator. The leased vehicles are used solely to transport Oklahoma's freight.

The lease provides that Oklahoma has the sole right to control the use of the vehicles. The lease is to last for one year, but each party may cancel on 30 days notice. Payment for the use of the tractor is based exclusively on mileage. If the vehicle is not used, no payment is due. Oklahoma does not bind itself to provide the owner-operator with any freight to transport under either the lease or the union contract.

Oklahoma employs the owners as drivers. The drivers drive their own vehicles when they are able to do so, but occasionally others drive their vehicles and they drive the vehicles of others. The owner-operators receive pay for driving solely on the basis of mileage. If their services are not used they receive no pay. This contrasts with Oklahoma's treatment of the drivers it employs to drive its own vehicles. The latter receive a flat rate of $50.00 per

week plus mileage. The owner-operators and their vehicles are normally used on long trips while the other drivers and vehicles are used for travel nearer the plant.

The lease provides that Oklahoma has the right and duty to keep the vehicles in repair but is to bill the owners for parts. However, under the union contract governing the owner-operators, the responsibility for repair is passed back to them so that, in fact, as the court below recognized, they are responsible for both the labor and cost of parts used in repair. Thus, the actual situation is that Oklahoma inspects the vehicles for compliance with ICC regulation, but when defects are found the owner-operators have the responsibility for and control over the methods by which repairs are to be made and the party who is to make them. Ordinary running expenses are also paid for by the owner-operators.

Oklahoma decides when and where trucks are to go, loads them for outbound trips, and unloads the inbound shipments of raw materials. The lease agreements give Oklahoma the right to specify the route to be followed and, when sending the trucks out, Oklahoma loads the furniture in a way which controls the order in which stops must be made. The compensation is based on the shortest route between those stops.

Oklahoma carries liability insurance on the trucks and insures the cargoes. It does not protect the vehicles with insurance. It pays the owner-operators by one check for the use of their vehicles and by another for their services as drivers. It makes pay-

roll deductions from the latter paycheck for income tax withholding and Social Security.

2. In proceedings before the Interstate Commerce Commission initiated under § 204(c) of the Interstate Commerce Act (49 U.S.C. 304(c)), the Commission determined that the owner-operators were engaged in interstate transportation for compensation and entered an order directing them to cease and desist from engaging in such transportation without obtaining contract-carrier permits from the Commission, as required by § 209(a)(1) of the Act (p. 3, *infra*). Rejecting appellees' claim that the transportation was exempt private carriage (see § 203(a)(7), p. 2, *supra*) performed by Oklahoma itself, with the owner-operators acting solely as its employees, it held both that Oklahoma did not exercise complete dominion and control over the operation of the leased vehicles and that, in any event, the services performed by the owner-operators were essentially equivalent in character to those performed by contract carriers.

In proceedings under 28 U.S.C. 1336, 1398 and 2321–2325, the three-judge district court set aside the Commission's order (pp. 19–33, *infra*). It held that the Commission's findings that Oklahoma did not exercise complete control over the operations were not supported by substantial evidence and that, being subject to Oklahoma's control, the transportation here should properly be characterised as private carriage performed by Oklahoma itself rather than as the furnishing of transportation for-hire by the owner-operators.

THE QUESTION IS SUBSTANTIAL

This appeal goes only to the question whether, as the district court thought, the control exercised by Oklahoma over the operations is determinative or whether, as the Commission alternatively held, the transportation should be characterized as contract carriage whether or not subject to Oklahoma's control. It is our position, in brief, that the characterization should turn, not upon control of the operations—an incident that may readily be shifted to suit the parties' convenience—but upon the more substantial incident of the financial burdens and risks of performing the service, with the party who bears the essential risks of engaging in the transportation business being treated as the person performing the transportation for purposes of the permit requirements. That presents, we believe, a question not only of substance but of broad importance to the regulation of the transportation industry.

1. The basic problem exemplified by this case—the diversion of traffic from the regulated carriers into unregulated modes of transportation—is one of constantly increasing importance. As noted by the Senate Committee on Interstate and Foreign Commerce in reporting the bill which became the Transportation Act of 1958 (S. Rep. 1647, 85th Cong., 2d Sess. (1958) pp. 23–24):

> A matter of serious concern to the committee is the growing practice of persons engaging

in the commercial transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

The enormous growth of commercial private carriage of property by motor vehicle in recent years, resulting as it has in a continuing erosion of huge volumes of traffic that would otherwise be available for transportation by public carriers, is a serious problem for the railroads and other common carriers. To the extent that this growth has occurred in bona fide private carriage, i.e., the transportation of one's own materials, supplies, and products in one's own vehicles within the scope and in furtherance of one's primary business enterprise (other than transportation), there is no room for complaint; but there is just cause for complaint as to motor carriage which although performed under the guise of private transportation is actually public transportation. * * *

* * * * *

There are numerous variations but, whatever the precise nature of the subterfuge em-

ployed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its transportation requirements. Protection is needed from destructive competition of this kind.

The Interstate Commerce Commission has said that this is one of the problems of most serious concern to it in administration of the Interstate Commerce Act, that where so-called private carriage is a subterfuge for engaging in public transportation it constitutes a growing menace to shippers and carriers alike, being injurious to sound public transportation, promoting discrimination between shippers, and threatening existing rate structures. It was to curb just such practices that part II of the Interstate Commerce Act was enacted.

In recent years, the Congress has expressed repeatedly its concern with the erosion of the traffic available to public carriers, particularly common carriers. Thus, in 1957, following this Court's decision in *United States* v. *Contract Steel Carriers,* 350 U.S. 409, Congress tightened the definition of "contract carrier by motor vehicle" in § 203(a)(15) of the Interstate Commerce Act.[1] Both in 1957 and in the Transportation Act of 1958 (72 Stat. 574) Congress amended § 203(c) in attempts to distinguish more effectively between bona fide private carriage and for hire transportation.

[1] The interpretation of the 1957 amendments is in issue in *Interstate Commerce Commission* v. *J-T Transport Co., Inc.*, No. 563, this Term, in which the Commission's Jurisdictional Statement was filed on December 5, 1960.

In June 1960, the Commission's Bureau of Transport Economics and Statistics prepared for the Senate Committee on Interstate and Foreign Commerce a study entitled *Gray Area of Transportation Operations*. "Gray area" was defined as "transport operations which lie between legitimate private carriage and the transportation authorized by Government regulatory bodies" (*id.* at p. i). The study found that various leasing devices, such as is involved in this case, "constitute the most prevalent type of gray area operation at present" (*id.* at p. 107),[2] and that "a large part of [the gray area operators'] traffic is a direct diversion from [authorized] carriers (*id.* at p. 108).

Nor is the problem solely one of the loss of volume by the regulated carriers, for the traffic diverted tends to be the more profitable traffic and that left to them, the less profitable. As the *Gray Area* study pointed out, "Two special aspects of the traffic diversion problem of authorized carriers are the loss of return haul traffic and the loss of profitable truckload traffic. The latter is often accompanied by an increased proportion of less-than-truckload traffic, which may be less economical or less convenient to handle" (*id.* at p. 108). The effect of the diversion of high-rated commodities and truckload shipments from the authorized public

[2] The question of determining what constitutes private carriage versus for-hire transportation has been before the courts frequently, *e.g. Bridge Auto Renting Corporation* v. *Pedrick*, 174 F. 2d 733 (C.A. 2), certiorari denied, 338 U.S. 850; *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17 (E.D. N.Y.), affirmed, 331 U.S. 784; *Interstate Commerce Commission* v. *Gannoe*, 100 F. Supp. 790 (W.D. Pa.); and see cases cited at page 15, *infra*.

carriers, relegating them to a stand-by basis and to handling the lower-rated commodities and less-than-truckload shipments, is, in turn, necessarily to impair their capacity to discharge their common carrier obligations—particularly to the many small shippers who depend upon common carrier service. As the *Gray Area* study concluded (pp. 108–109):

> Considering the long run interest of shippers and the general public interest in transportation, the continued development of gray area transportation could be detrimental in terms of fewer authorized carriers available, less frequent schedules, reduction in scheduled carrier equipment—in general, a decline in the quantity and/or quality of regulated for-hire transportation.

2. Bona fide private carriage is, of course, specifically exempted from the certification requirements of the Act, and to that extent the Commission cannot prevent the diversion of traffic from the regulated carriers. There are, however, inherent disadvantages in a shipper's undertaking private carriage which provide a natural limitation on the extent of such diversion. Investment in equipment is required, and employment of drivers means increased payroll obligations. Efficient utilization of both equipment and men requires close supervision and experienced management,[8] and for a company without experience in the transportation business the risks of loss are substantial, particularly if, as is often the case, the vol-

[8] It was, for example, because of Oklahoma's inability to prevent credit-card abuses by its drivers that it abandoned the use of its own trucks on long hauls (pp. 20–21, *infra*).

ume of shipments is small or is subject to both seasonal and short-term fluctuations. Thus, so long as shippers can undertake private carriage only by assuming those risks and burdens, natural economic forces provide a limit upon the extent of diversion of traffic from the regulated carriers.

The decision below, however, removes that limitation. By making the single element of control determinative, it permits Oklahoma, by the simple device of contracting for "control" of the operations, to obtain transportation at a fixed cost per mile, not subject to the Commission's regulation, while at the same time leaving to the owner-operators the entire risk of loss, both of time and of money, arising from the vicissitudes of the transportation business. Under the leasing arrangements between Oklahoma and the owner-operators, the owner-operators provide the vehicles, drive them themselves (except in exceptional cases), and bear the entire risk that the investment of time and money will be unprofitable, being entitled to payment from Oklahoma only at a fixed cost per mile for transportation actually performed. The owner-operators thus bear the initial investment, all costs of operation and repair, the risks of breakdowns and road delays, and, perhaps most significant of all, the entire burden of nonutilization. The only risk assumed by Oklahoma in the operation of the tractors[4] is that of liability to the public, which, being passed on to insurers, amounts ultimately to no more than a

[4] Oklahoma does provide the trailers and bear the cost of cargo insurance, but that of course is typical of the contract carriage to which the Commission equated the operations here.

rate adjustment. The net result, in short, is that Oklahoma is buying transportation at a fixed cost per mile from owner-operators who bear all the financial risks of engaging in transportation.

In permitting that result, the court below gave to the single element of control a significance that cannot be justified in terms of any purpose relevant to the certification requirement.[8] Exclusive use of the vehicles and control over such matters as loading and order of deliveries may of course be of substantial importance to the shipper to assure prompt and reliable transportation of his goods, but such elements of control are common between shippers and contract carriers, who often devote equipment to the exclusive use of a single shipper. The elements of shipper control present here which *distinguish* the arrangements from those with the usual contract carrier—"control" over such matters as repairs, specific choice of routes between intermediate delivery points, etc.—are not matters of substantial concern to the shipper, and his assumption of control, unaccompanied by financial responsibility, is likely to be formal at best. Those are matters that directly affect only the person bearing the costs of operation, and the contractual assumption of the right to control such matters by a shipper divorced from the financial consequences of their efficient management is, we submit, an incident of no sub-

[8] The *absence* of control by the purported private shipper is of course normally dispositive, and it is for that purpose that the Commission has used the test (see *e.g.*, *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161), but it does not follow that the *presence* of shipper control is by itself enough to qualify the transportation as private carriage.

stantial significance in characterizing the relationships created. The effect of making those incidents determinative is simply to give to the parties the power, without affecting their own interests in any substantial way, to contract themselves out of the regulatory scheme.

3. The allocation of the financial burdens and risks of the transportation service provides what we believe is a much more substantial basis for distinction between private carriage and contract carriage. The financial risks are of course the incidents that are of primary concern to the parties and the ones that dictate their choice among the alternative arrangements. They should also, we believe, determine the characterization of the transportation as private or contract carriage.

In the first place, a standard based on the financial relationships seems to conform more literally to the language of the Act than does a "control" test. The Act defines as a "contract carrier" any person who "engages in transportation * * * [of property] for compensation" (§ 203(a)(15)). The distinction that the Act suggests between private and contract carriage is whether it is "transportation" as such that is being purchased, or whether the shipper separately acquires the factors of which transportation is made up (labor, equipment, fuel, etc.) and himself combines them into a functioning transportation facility.

In form, of course, the owner-operators here do purport, by virtue of the separate leasing and collective bargaining agreements, separately to "sell"

their labor and the use of their trucks. It is the economic reality behind the arrangements, however, not their form, which is crucial in determining the status of a carrier. *United States* v. *La Tuff Transfer Service,* 95 F. Supp. 375 (D. Minn.); *Interstate Commerce Commission* v. *Isner,* 92 F. Supp. 582 (E.D. Mich); *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.,* 78 F. Supp. 13 (D. Minn.). The economic reality here is that, because the owner-operators assume all the financial risks and bear all the variable costs, Oklahoma is in the end required to pay only a pre-determined fixed cost per mile for such transportation services as are actually performed. That is, what Oklahoma pays for is transportation services as such, not hours of labor or use of vehicles. The compensation is unrelated to hours and there are none of the usual fixed charges of equipment leases—a daily "overhead" charge for the use of the vehicles or at least a minimum mileage guarantee.

In substance, therefore, it is transportation as such for which Oklahoma pays. It necessarily follows that it is "transportation", and only transportation, for which the owner-drivers are "compensated". In short, where, as here, the owner-operators bear all the financial risks so that the shipper is assured of transportation services at a fixed cost per mile, they are engaged, not in selling labor and leasing trucks, but in providing "transportation * * * for compensation". As such, they are literally within the statutory definition of "contract carrier by motor vehicle" (§ 203(a)(15)).

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Moreover, making the exemption of private carriage turn upon the shipper's assumption not simply of "control" of the transportation service, but of the concomitant financial risks as well, furthers the broad purpose of the Act to protect those who assume the burdens and responsibilities of public carriers against the siphoning-off of the more profitable traffic into extra-regulatory transportation arrangements. Shippers are still free, so long as they are willing to assume the financial risks of the operations, to turn to private carriage. But that requirement tends to limit private carriage to circumstances in which it offers true efficiencies of operation. The decision below, on the other hand, permits shippers, without assuming that burden, to divert traffic from regulated carriers to unregulated owner-operators virtually at will. That affords an opportunity that will be availed of, we submit, not because it reflects a more efficient organization of the transportation industry, but simply because the unregulated competition among owner-operators permits shippers to obtain lower rates than those of the regulated carriers. The result, if the decision below is allowed to stand, can only be to encourage a substantial diversion from the regulated carriers of the more profitable traffic essential to a viable public transportation system.

CONCLUSION

We submit that the question of whether an effective line is to be drawn between private carriage

and for-hire transportation is substantial and of such public importance as to require plenary consideration, with briefs and oral argument, for its resolution.

Respectfully submitted.

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DECEMBER 1960.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, ET AL., PLAINTIFFS, *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before MURRAH, *Chief Judge,* CHANDLER, *Chief Judge,* and RIZLEY, *District Judge.*

CHANDLER, *Chief Judge.*

OPINION

Plaintiffs instituted this action under 28 U.S.C. Sections 1336, 1398 and Sections 2321 through 2325 to vacate, set aside and annul certain orders of the Interstate Commerce Commission entered in a proceeding initiated by the Commission on its own motion under Section 204(c) of the Interstate Commerce Act (49 U.S.C. Section 304(c)), and to enjoin the Commission from enforcing or attempting to enforce said orders.

The Commission by order of August 28, 1957, began an investigation under said Section 204(c) of the Act to determine whether the individual plaintiffs, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd Shinn and William M. Martin,[1] were engaged

[1] Marion W. Daves is no longer employed by Oklahoma Furniture Manufacturing Co. and William M. Martin is now deceased.

in transportation of property in interstate or foreign commerce for compensation as common or contract carriers by motor vehicle, in violation of Part II of the Interstate Commerce Act, and whether the plaintiff Oklahoma Furniture Manufacturing Co. had participated in any such violation. In its report the Commission found that the individual plaintiffs had been and were engaged in transportation of property in interstate commerce for compensation as contract carriers by motor vehicle without appropriate authority in violation of Section 209(a)(1) of the Interstate Commerce Act (49 U.S.C. Section 309(a)(1)) and entered an order requiring said plaintiffs to cease and desist from all operations found in the report to be unlawful. A petition for reconsideration and exception to said report and order were filed by plaintiffs and denied by the Commission by order of December 29, 1959.

The Regular Common Carrier Conference of American Trucking Associations, Inc. has intervened in this action in support of defendants' position and Weather-Seal, Inc. has intervened in support of plaintiffs' position.

Oklahoma Furniture Manufacturing Co. (hereinafter referred to as the Company) is engaged in the manufacture of furniture at Guthrie, Oklahoma, which it sells to retail furniture dealers throughout the United States. The Company owns six tractors and seventeen trailers, and in addition to this equipment leases a tractor from each of the individual plaintiffs (hereinafter referred to as owner-operators) under separate lease agreements. All this equipment is used in the interstate transportation of the Company's furniture to retail dealers and in the back-haul of raw materials to the Company. Prior to 1952 the Company carried on all its transportation of goods in

company-owned equipment operated by employees of the Company, but upon discovering that the drivers were defrauding it by improper use of credit cards, the Company changed to a system of operation whereby each driver owned and maintained his own tractor, which was leased to the company with the driver being paid on a mileage basis. To effectuate this method of operation, the Company entered into a lease agreement with each driver. These initial leases were subsequently replaced by others which were, in turn, replaced by the present leases with which we are here concerned.

The leases provide in substance as follows: (1) the Company shall pay the owner-operator 10¢ a mile for hauling single-axle trailers and 11¢ a mile for hauling tandem-axle trailers, plus an additional 3¢ a mile for back-haul of the Company's raw materials, (2) payments under the agreement shall be made weekly, (3) motor vehicles covered by the agreement shall be operated by an employee of the Company who shall be properly qualified and physically fit in accordance with state and federal regulations, (4) the owner-operator shall pay all operating costs arising from operation of said equipment (gasoline, oil, grease and parts) and shall pay cost of license plates, (5) the Company shall keep and maintain said equipment in first-class operating condition and in compliance with all safety rules and regulations of state and federal regulatory bodies, (6) if owner-operator fails to pay operating cost of equipment, the Company may cancel the agreement or at its option pay the necessary operating costs and charge same to owner-operator's account with the Company, (7) the Company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the Company and the

Company will not sublease the equipment to any other person, firm or corporation, (8) the Company shall not be liable for wear, tear and depreciation nor for any damage caused to the leased equipment by accident, theft, fire or any other hazard or casualty, (9) the owner-operator shall not be responsible for loss to company equipment, property and cargo, (10) the Company will have the name of the owner-operator endorsed as an additional assured upon its policies of property damage and public liability insurance covering the operation of motor vehicles, (11) either party may cancel the lease upon giving 30 days' written notice to the other party, (12) the agreement shall remain in full force and effect for one year from date of execution and shall be automatically renewed for further periods of one year unless cancelled in accordance with provisions of the agreement, or terminated by operation of law.

The Company also entered into a union contract as employer of its drivers. The contract covers both drivers of company-owned vehicles and the owner-operators who usually drive their own tractors and who are also treated by the Company as employees. Although all the drivers do not belong to the union, the terms of the contract apply equally to non-union employees. This contract provides, in pertinent part, as follows: (1) the Company may discharge any employee for cause, (2) the owner-operators shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cents a mile for living expenses, and 0.25 cents a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, and shall be paid 6 cents a mile for backhauls of raw materials, (3) drivers of company-owned tractors shall receive a basic salary of $50.00 a week plus 2 cents a mile for driving, (4) owner-operators having driven 75,000 miles during a year in which the

contract is in effect shall be entitled to vacation pay computed upon the rate of pay for driving and the average weekly mileage in the preceding year, (5) owner-operators shall maintain their trucks in good running condition at all times, (6) owner-operators shall pay their own living expenses while on the road, (7) the provision of the union contract which guarantees employees 6 hours work or pay if they report for work at their usual or regular time shall not apply to owner-operators.

The record made before the Commission shows that the operations of the Company and the owner-operators are in substance carried on in accordance with the provisions of the lease agreements and the union contract, with one exception. The lease agreements provide that the Company shall maintain the tractors of the owner-operators and the union contract provides that the owner-operators shall maintain them. The testimony in the record supports the Commission's finding that the owner-operators in fact maintain their vehicles.

The record also reveals the following: The owner-operators are not authorized by the Interstate Commerce Commission to engage in the transportation of property either as contract carriers or common carriers by motor vehicle in interstate commerce. The Company uses the 6 tractors which it owns chiefly for short hauls and these are usually driven by the salaried company drivers. The tractors leased by the Company are utilized chiefly for long hauls and are usually operated by the owner-operators, each driving his own tractor. It is the practice of the Company to assign the same driver to the same equipment, regardless of whether it is company-owned or leased. However, when necessity or convenience make it more feasible to do so, drivers who usually drive

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company-owned tractors are assigned to leased tractors and owner-operators to company-owned tractors. All trailers used in the Company's operations are owned by it. A supervisor employed by the Company oversees all drivers, assigns trips and checks to see that all equipment is properly maintained and repaired. Detailed routing instructions are issued to all drivers and compliance therewith is insured by manner of loading, e.g., last goods to come off are loaded first and the first to come off are loaded last. Prior to departure drivers are handed a truck bill manifest which differs from a bill of lading in that the drivers are not required to sign a receipt for the freight they transport. Each owner-operator receives two weekly paychecks, one for rental of his tractor and the other for his service as a driver. The Company deducts from the paychecks of the owner-operators social security and withholding taxes, pays the employer's share of social security and provides workmen's compensation benefits for them. The Company maintains on file drivers' logs, physicians' certificates and vehicle inspection reports. Both company-owned tractors and leased tractors are garaged at the homes of their respective drivers. The Company has the right to hire and fire drivers independently of the lease agreement.

The primary issue presented is whether the interstate transportation operations herein involved constitute private carriage conducted by the Company, or contract carriage on the part of the owner-operators. As the court in *Lamb* v. *Interstate Commerce Commission*, 10 Cir., 259 F. 2d 358, put it, "Simply stated it is who was transporting the goods in question," that is, whose operations in interstate transportation were these, those of the Company or those of the owner-operators?

The pertinent statutes involved are as follows: 49 U.S.C. Section 303(a)(15) provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation refered to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

49 U.S.C. Section 303(a)(16) provides:

> The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

49 U.S.C. Section 303(a)(17) provides:

> The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

49 U.S.C. Section 304(c) provides:

> Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant

> thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

49 U.S.C. Section 309(a)(1) provides in part:

> Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business * * *

49 U.S.C. Section 42 provides:

> In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

The parties appear to be in some slight disagreement as to the scope of judicial review of an order of the Commission. The defendants contend that "The

judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282. They further contend that the court can only determine whether or not the Commission's findings are supported by substantial evidence. *Riss & Co., Inc.* v. *United States,* W.D. Mo., 100 F. Supp. 468, affirmed 342 U.S. 937, rehearing denied 343 U.S. 937. Plaintiffs, on the other hand, state that a reviewing court when passing on the validity of a Commission order should ascertain whether it is supported by *substantial evidence on the record considered as a whole. Coyle Lines* v. *United States,* E.D. La., 115 F. Supp. 272. While this court recognizes the distinction emphasized in the latter case, it nevertheless feels that even under the rule as set forth by defendants a reviewing court will consider the whole record in determining whether there is substantial evidence to support such an order.

Plaintiffs allege that the Commission was without jurisdiction to initiate its investigation into the operations of plaintiffs for the reason that it proceeded under 49 U.S.C. Section 304(c) which only authorizes it to investigate motor carriers and brokers and that since the term "motor carrier" includes only common carriers and contract carriers, the Commission had no authority to investigate the operations of the Company because it is a shipper and a private carrier. In view of the fact that 49 U.S.C. Section 303(c), 49 U.S.C. Section 306(a)(1) and 49 U.S.C. Section 309 (a)(1) prohibit any person from engaging in operations as a common carrier or contract carrier without an appropriate certificate or permit issued by the Commission and that 49 U.S.C. Section 304(c) authorizes the Commission to investigate whether any motor carrier has failed to comply with any provision of

Part II of the Act, and after notice and hearing, to issue any appropriate order to compel compliance, it necessarily follows that the Commission has the right, power and duty to inquire into operations such as those involved here to ascertain whether persons are in fact carrying on common carrier or contract carrier operations in violation of the Act. It is therefore evident that the Commission had jurisdiction as regards the owner-operator plaintiffs and 49 U.S.C. Section 42 granted the Commission authority to join the Company.

In reaching its decision on the primary issue herein involved, the Commission utilized two tests: (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire. Both tests have been approved by the courts. See *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, D. Minn., 78 F. Supp. 13, where the court stated:

> In order for the operations to be those of the shipper as a private carrier there must be a clear and unequivocal showing that the shipper exercises control and responsibility over the operations of the vehicle, such as would be exercised by it if it were the owner of the vehicle.

See also *Interstate Commerce Commission* v. *Gannos*, W.D. Pa., 100 F. Supp. 790; *Motor Haulage Co.* v. *United States*, E.D.N.Y., 70 F. Supp. 17, affirmed 331 U.S. 784; *United States* v. *La Tuff Transfer Service*, D. Minn., 95 F. Supp. 375. In regard to the second test mentioned, see *Georgia Truck System Inc.* v. *Interstate Commerce Commission*, 5 Cir., 123 F. 2d 210; *Lamb* v. *Interstate Commerce Commission*, supra;

A. W. Stickle Co. v. *Interstate Commerce Commission*, 10 Cir., 128 F. 2d 155, cert. den. 317 U.S. 650.

In addition to these tests the Commission also relied upon a rebuttable presumption (which defendants state is essentially an inference) set forth by the Commission in *H. B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191, as follows:

> * * * in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation.

This "presumption" has been indirectly recognized by the courts. See *Motor Haulage Co.* v. *United States, supra*, and *Interstate Commerce Commission* v. *Gannoe, supra*. It will be noted, however, that in the above cited *Church* decision the Commission stated that the presumption arises only "in the absence of a showing to the contrary," and that "This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of controlling the transportation service, * * *" The Commission in that decision further stated:

> The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder. No element of such facts and circumstances is by itself controlling.

The Commission in the instant proceeding in effect made the presumption irrebuttable and repudiated its decision in the *Church* case by the following declaration:

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.

This is true unless, of course, the Commission formulated a new rule, thinking as this court is inclined to think, that this situation does not technically justify application of the presumption because it is not one involving "a lease of equipment with drivers by a carrier to a shipper," but a lease of equipment alone with the drivers to be supplied by the Company. In any event, the court does not agree with the reasoning of the Commission that the quoted conclusion necessarily follows.

The record before the Commission discloses that there was more than sufficient evidence to rebut any presumption or inference of transportation for-hire. The Company had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith. The owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company and were so considered by both the Company and themselves.

As is urged by defendants, substance, not form, should be the governing factor in determining whether these operations constituted transportation for-hire on the part of the owner-operators. *United States* v. *La Tuff Transfer Service, supra; Georgia Truck System, Inc.* v. *Interstate Commerce Commission, supra.* In the instant case both the form and the substance of the arrangements as revealed by the lease agreements, union contract and actual operations, clearly point to the fact that what is involved here is private carriage on the part of the Company,

rather than transportation for-hire by the owner-operators. The Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. The change in form alone did not change the substance of the Company's operations. The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles.

Defendants contend that there are three aspects of this transportation which the owner-operators retained a right to control. First, it is alleged that since the owner-operators are responsible for the maintenance of their own vehicles, they have the right to decide where and what kind of repairs are to be made. The testimony before the Commission shows that Company personnel oversee maintenance and repairs of all equipment used by the Company; that the owner-operators have to meet the requirements of the Company as to state of repair and that their equipment is checked by Company personnel periodically to ascertain whether it meets certain requirements and whether specified repairs have been made. There is, therefore, no real control over maintenance exercised by the owner-operators. Second, defendants point out that the owner-operators garage their tractors at their homes and that they could use them for their own purposes and could even haul for others. Since drivers of company-owned vehicles also garage the vehicles they drive at their homes, no element of control appears by virtue of the fact that the owner-operators have that right. And, it appearing that the owner-operators are on call at all times to haul Company goods, it is far-fetched to speculate that they might possibly breach their lease agreements in order to haul for someone else. There is no evidence of any

of them ever having done so. Third, defendants contend that the owner-operators retain considerable right to control their vehicles while driving them for the Company and that there is a possibility of a conflict of interest, say in a situation where an owner-operator might have to choose between stopping immediately to make repairs, thereby arriving late with a shipment, or continuing at the risk of incurring more expensive repairs. All drivers have some independent decisions to make, and as to *possible* areas of conflict, these are *conjectural only* and not of such stature as to constitute an element of control on the part of the owner-operators.

As was pointed out in the dissent to the Commission report, and the statement is equally applicable here, the cases most heavily relied on by the Commission to support its order involve a person or firm owning equipment, employing drivers and making both available to the lessee, or in some cases, to several lessees. The facts here are materially different. In addition, in each of the cases relied on by defendants, there was some element of control long considered important by the courts and the Commission which was retained by the lessor; or there were some duties which ordinarily fall on the carrier, private or otherwise, which were assumed by the lessor or no one.

Upon consideration of the record, the court concludes that the findings of the Commission are not supported by substantial evidence. For that reason the cease and desist order entered against the owner-operators must be set aside. Judgment will be entered accordingly.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 8708

HENRY E. DRUM, ET AL., PLAINTIFFS *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER

Now on this 13th day of August, 1960, in accordance with the opinion of the court filed herein this date, the orders of the Interstate Commerce Commission entered in these proceedings are hereby vacated, set aside and annulled.

/S/ STEPHEN S. CHANDLER,
Chief Judge.

Filed Aug. 15, 1960.

VERA L. HOWARD,
Clerk, U.S. District Court.
By /S/ VERA EDDLEMAN,
Deputy.

APPENDIX B

Interstate Commerce Commission

No. MC–C–2143

OKLAHOMA FURNITURE MANUFACTURING CO. ET AL.—
INVESTIGATION OF OPERATIONS

Decided April 22, 1959

1. Furnishing of truck-tractors and drivers by certain respondent owner-operators to respondent Oklahoma Furniture Manufacturing Company found under the circumstances disclosed, to constitute operation by the owner-operators as contract carriers by motor vehicle in violation of the provisions of the Interstate Commerce Act. Cease and desist order entered.
2. Proceeding discontinued as to all other respondents.

Walter D. Hanson for respondents.

Ellis V. Gregory, Lloyd R. Reeder, and *William W. Guild* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by respondents jointly, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied.

By order entered August 28, 1957, division 1 instituted an investigation under section 204(c) of the Interstate Commerce Act into and concerning the motor-carrier operations and practices of respondents, Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Robert A. Custard,[1] Charles W. McGee, Todd Shinn, and William M. Martin, hereinafter collectively referred to as the owner-operators, to determine whether they have been or are engaging in the transportation of property, in interstate or foreign commerce, for compensation, as common or contract carriers by motor vehicle in violation of any of the provisions of part II of the Interstate Commerce Act, or of any requirements established pursuant thereto and whether respondent, the Oklahoma Furniture Manufacturing Company, hereinafter referred to as the company, has, in concert with the aforementioned parties, participated in said violations; to determine what orders should be entered to remove any unlawfulness found to exist; and for the purpose of taking such other and further action as the facts and circumstances may appear to warrant.

The order of investigation recited that there is reason to believe that the respondents have been or are engaging or participating in the transportation of property, in interstate or foreign commerce, for compensation, as common or contract carriers by motor vehicle subject to the provisions of part II of the act

[1] Subsequent to the entry of this order and prior to the hearing, Robert Custard terminated his vehicle lease contract with respondent Oklahoma Furniture Manufacturing Company, and the latter entered into a similar equipment leasing arrangement with Charles McGee, of Guthrie, Okla. By stipulation between the parties it was agreed that McGee be substituted in place of Custard as a respondent in this proceeding.

between Guthrie, Okla., and points throughout the United States, without there being in force a certificate of public convenience and necessity or a permit issued by the Commission authorizing any of the aforementioned parties to engage in operations as a common or contract carrier.

The company, at Guthrie, manufactures furniture which is shipped, in company-owned trailers pulled by either company-owned or leased motor equipment, to dealers located at points throughout the United States. The same equipment is usually utilized on return trips to Guthrie to carry raw materials which are used by the company in the manufacture of its products. The company owns 6 tractors which are operated by salaried drivers and 17 trailers which are pulled by its own tractors or those individually owned by and leased from owner-operator respondents. Prior to 1952 the transportation was performed wholly in company-owned units driven by salaried employees. In 1951 the company discovered upon investigation that it was being defrauded by most of its drivers through the improper use of the credit cards which had been issued to them. The delinquent drivers were discharged and the company began to use leased owner-operators' tractors. In 1955 after one owner-operator was arrested in Arkansas for operating without appropriate authority, a suit was filed in the civil courts of that State for a declaratory judgment as to whether the owner of the tractor was required to obtain a permit from the Arkansas Public Service Commission. In *Robinson* v. *Woodard*, 227 Ark. 102, 296 S.W. (2d) 672, decided December 10, 1956, the Supreme Court of Arkansas held that the arrested owner-operator was performing service, not as an employee of the company, but as a motor contract carrier operating unlawfully in Arkansas.

The fact that the owner-operator was required to pay the costs of operation was found to be incompatible with private carriage under a section of the Arkansas statutes which reads:

> Any person, who by lease or otherwise permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission [Arkansas Public Service Commission], and who furnishes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier.[2]

Review of the decision of the Arkansas Supreme Court by the United States Supreme Court was sought but certiorari was denied. Subsequent thereto, in or about July 1957, the company canceled all prior agreements and entered into new equipment leasing arrangements specifically drawn and designed to insure that its use of leased tractors driven by the owners would be bona fide private carriage within the meaning of applicable State and Federal law. It is these arrangements and the transportation provided thereunder with which we are here concerned. The written leases entered into between the company and each of the owner-operators uniformly provide in substance that (1) during the term of the lease, the company shall pay the owner-operator 10 or 11 cents a mile, depending upon whether a single-axle or tandem-axle trailer is utilized, for each mile the unit

[2] The term "motor carrier" under the applicable Arkansas statute includes both a common carrier by motor vehicle and a contract carrier by motor vehicle and any person performing for-hire transportation service without authority from the Arkansas Public Service Commission.

is operated, plus an additional 3 cents a mile on backhauls of the company's raw materials which usually are heavier than outbound cargoes, (2) payments under the agreement shall be made weekly, (3) the motor vehicles covered shall be operated by an "employee" of the company who shall be properly qualified and physically fit in accordance with State and Federal regulations, (4) the owner-operator shall pay all operating costs including the cost of gasoline, oil, grease, and parts, and at his own expense shall procure the Oklahoma commercial license plates to be used on the said equipment, (5) the company shall keep and maintain said equipment, at all times while in operation under this lease, in first-class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies, (6) in the event of the owner-operator's failure to pay the operating costs, the company may, at its own option, cancel the agreement forthwith or pay the necessary operating costs and expenses and charge the same to the owner-operator's account with the company, (7) the company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the company, and the company will not sublease the equipment of any other person, firm, or corporation, (8) the company shall retain from all rental compensation due to the owner-operator 5 percent thereof, until the amount of $1,000 has accumulated, (9) this sum shall be refundable to the owner-operator, less any expense which the company is forced to pay for the account of the owner-operator, or any other sums due the company under the contract, (10) the company shall not be liable for any damage caused to the leased equipment by accident, theft, fire, or any other hazard or casualty, (11)

the company will have the owner-operator's name endorsed with its own as an additional assured upon property damage and public liability insurance policies covering the operation of motor vehicles, but shall not be required to carry collision, fire, theft, or any other type of insurance for the owner-operator's account; and, if the owner-operator himself carries such insurance, it shall be at his sole cost, but the owner-operator shall not be responsible for any loss to company equipment, property, or cargo, (12) either party may cancel the lease upon the giving of 30 days' written notice to the other party, and (13) the agreement shall remain in full force and effect for a period of 1 year from the date of the execution, unless ordered terminated by operation of law, by the mutual consent of the parties, or by virtue of any other provision of the contract.

The company pays the social security taxes upon, and withholds income taxes from, the wages of the owner-operators, as well as providing workmen's compensation benefits. It carries public liability and property damage insurance on the leased units and cargo insurance on the lading transported by such units. The owner-operators are shown as assureds or beneficiaries in the liability insurance policy carried by the company. This liability insurance is in force at all times on the leased tractors, whether they are pulling company trailers or are being used by the owner-operators as a method of transport between the company's place or business and their homes. The company maintains on file physicians' certificates, drivers' logs, and vehicle inspection reports.

The company has entered into a contract with the United Furniture Workers of America, AFL–CIO, as employer of certain of the owner-operators. Although not all of the latter are members of the union,

arrangements specified in the contract are applicable to the company's nonunion employees. Among other things, the union contract provides that the company may discharge any employee for cause; that the owner-operators shall maintain their trucks in good running condition "at all times" [3] and pay their own living expenses while on the road; and that they shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cent a mile for living expenses, and 0.25 cent a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, increasing to 6 cents a mile on a return movement of raw materials. The contract with the union covering owner-operators further stipulates that any owner-operator who has driven at least 75,000 miles during a year in which the contract is in effect shall be entitled to vacation pay (for 1 or 2 weeks depending upon his length of service with the company), computed upon the rate of pay for driving and the average weekly mileage in the preceding year. The union contract exempts owner-operators from those provisions which guarantee employees 6 hours work or pay if they report for work at their usual or regular time and drivers of company-owned tractors a specified minimum weekly salary. The drivers of company-owned tractors, also under contract, receive a basic salary of $50 a week plus 2 cents a mile for driving.

Each owner-operator receives two weekly paychecks, one covering the rental for the use of his tractor, and the other for his service as a driver. If for some reason the owner-operator is unable to drive his own tractor, it may be assigned to another driver, with the lessor continuing to receive compensation for

[3] This contract provision is inconsistent with provision (5) set forth above in reference to the leasing agreement between the company and each owner-operator.

the use of his tractor. In the event that an owner-operator exchanges tractors with another driver, his compensation would be based upon the mileage driven by him at the driving rate plus the mileage his tractor is operated by the other driver at the rental rate. Ordinarily the company uses the owner-operator on his own equipment. An instance to the contrary would be a situation arising when an owner-operator's equipment is disabled at a time that a driver of a company-owned (or leased) tractor is ill. The owner-operators pay for maintenance and repairs on their own equipment and use their tractors exclusively in the service of the company.

The service of each owner-operator is not used every day. If the company does not call him, he calls in to find out if he is to be loaded out. On days that his services are to be utilized he arrives at the company with his tractor and checks the bulletin board to find out whether he is supposed to go out on a trip. When there is a trip arranged he connects his tractor with a tandem or single-axle trailer of the company, which is loaded by yard employees of the company. The owner-operators are instructed as to the shortest routes, from the origin to the first delivery point and between the various points of delivery, upon which compensation is based and "which naturally they follow." Prior to departure the owner-operator is handed a truck bill manifest, which differs from a conventional bill of lading in that the owner-operators are not required to sign a receipt for the company freight they transport. The owner-operator pays all of the expenses of operation. After reaching his ultimate destination, the owner-operator picks up a load of inbound materials and returns it to the company plant. At the plant he files a repair report, unhooks

the trailer and goes home. The owner-operators garage their tractors at their homes.

The company's customers are not billed directly for transportation costs. Instead the company has divided the United States into zones and sells its furniture at a delivered price which varies according to the zonal location of the customer. Generally speaking, the more distant the zone from Guthrie the higher the delivered price; but in some instances, as where a lower price is required to meet competition or in a zone where the company purchases raw materials, or as between two points in the same zone, the converse is true.

There is no question but that the company's primary business is furniture manufacturing and that the transportation service performed in the company-owned units is incidental to its primary business.* Its utilization of company-owned tractor-trailer units driven by regular salaried drivers for transportation purposes is clearly private carriage. The substantial or primary issue here is as to whether those operations utilizing leased equipment of the owner-operators with their services as drivers are private carriage performed by the company or for-hire carriage performed by the owner-operators.

The examiner concluded that the operation of the leased tractors, although ostensibly controlled by the company, is actually controlled by the owner-operators; and that respondents have engaged in the transportation of property in interstate commerce for compensation without authority and in violation of the act; and he recommended that a cease and desist order be entered.

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*See section 203(c) of the Interstate Commerce Act as amended in August 1958.

Respondents contend on exceptions (1) that the described transportation is not subject to our licensing jurisdiction inasmuch as the company is purportedly a private carrier and the owner-operator purportedly its employee, (2) that the examiner's report contains statements of fact which are contradictory to the facts adduced, and the stipulation of facts ignores certain pertinent issues, and reaches conclusions unsupported by the evidence, (3) that the examiner erred in concluding that the company neither exercised control over, nor had any contacts with the drivers handling the loads other than to tender a bill of lading covering the shipments involved, (4) that the operations involved differ significantly from those which ordinarily occur when a for-hire carrier serves a shipper and in particular with respect to the control, direction, and dominance over the transportation exercised by the company, (5) that the examiner should have found (*a*) that the company keeps physicians' certificates and logs of all drivers, second vehicle condition reports, and complies with appropriate safety regulations, (*b*) that the company owns all equipment involved except 11 leased truck-tractors, (*c*) that the risk of cargo loss is upon the company and no bill of lading is signed (*d*) that the company has the right to hire and discharge drivers independently of the lease agreement, (*e*) that the leases involved are for a 1-year term, (*f*) that the leased equipment is used to transport the company's property exclusively, (*g*) that the company exercises exactly the same amount of control over drivers of leased tractors as drivers of company-owned tractors, and (*h*) that drivers of company-owned tractors, like the owner-operators, take their vehicles to and garage them at their homes, (6) that the examiner's findings and conclusions are not in accordance with the weight

of the evidence and applicable law, and (7) that, inasmuch as private carriage is involved, application of the national transportation policy to the situation here is contrary to law.

The Bureau argues in reply that the contention that this Commission is without jurisdiction over respondents' activities is predicated upon the assumption that the considered transportation is bona fide private carriage, when in fact the company's status, whether as shipper or private carrier, is the principal question at issue in this proceeding. The Bureau asserts that in an effort to protect itself against breaches of trust on the part of the drivers, the company has disassociated itself as much as possible from the actual operation of the leased vehicles and has assumed only such obligations of private carriage as would, in its opinion, give color and the form of legality to an otherwise unlawful operation. It argues further that the operations as conducted are inconsistent with a private carrier's status and that respondent owner-operators, in concert with the company, are shown to be engaged in a contract-carrier operation, for compensation, in interstate commerce, without authority.

The evidence adduced, the examiner's recommendations, the exceptions, and the reply thereto have been considered. Our discussion will be confined to those matters covered by the exceptions and reply, and the facts, so far as necessary for determination of the questions involved, are restated herein. All exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions, have nevertheless been considered and found not justified or it has been found that consideration thereof is unnecessary to a proper determination of the issues presented.

Exceptants' first contention is without merit. It is clearly within the scope of our powers and duties to determine whether the leased equipment is operated in private carriage or under leasing agreements which actually mask a for-hire operation conducted in violation of the act. Compare *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361, 366; and *Driver Service, Inc.—Investigation of Operations*, 77 M.C.C. 243. Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions; namely, (1) is the transporation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire. Compare *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, hereinafter called the *Pacific Diesel Rental Co.* case. Both questions must be answered in the negative for us to conclude that the challenged operations are those of a bona fide private carrier.

In considering the primary question here in terms of who has the right to control, direct, and dominate the transportation performed, it is important to note the distinction between the situation wherein a person or persons other than the purported private carrier actually exercise control, direction, and dominance of the operation involved and the situation wherein such person or persons have any right to control, direct, and dominate the operation as actually conducted. We are here concerned with whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly per-

formed by it as private carriage. In *H. B. Church Truck Service Co. Com. Car. Application* 27 M.C.C. 191, hereinafter called the *Church* case, it was stated:

> in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has *the exclusive right and privilege of * * * controlling the transportation service,* as, for example, if the equipment were operated by the shipper's employee. [Italics added.]

The presumption, as noted above, refers to the lessor of equipment as the "carrier," but it is clear that the presumption does not depend upon a prior determination that the "lessor" is a "carrier." Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or persons other than the purported private carrier leases equipment with drivers to a shipper. Another way of stating the presumption would read: In cases in which the question of the status created by a lease of equipment with drivers by a person (or persons acting in concert) to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by such person (or persons) as a carrier for compensation; in other words that it is for-hire transportation and as such is subject to regulation.

In essence, respondents argue that this presumption has been overcome inasmuch as the company: (1) loads and dispatches the shipments, (2) pays the owner-operators a salary for driving, (3) makes the

usual payroll deductions, (4) has entered into a contract with the union with respect to employment of the owner-operators under which it has the power to hire and discharge them as drivers, (5) requires the equipment involved to be devoted to its exclusive use, and (6) exempts the owner-operators from all responsibility for any losses sustained by it with respect to company equipment, property, and cargo. All of these practices may tend or are designed to show that the owner-operators actually exercise little, if any, control, direction, and dominance over the considered operations, but they have little probative weight with respect to the question of whether the company has the *exclusive right* to control, direct, and dominate the transportation purportedly performed by it as private carriage.

In determining this question we must remember that the two significant instrumentalities of commerce with respect to motor carriage are (1) the equipment by which the transportation is accomplished and (2) the driver thereof. *Pacific Diesel Rental Co.* case, *supra*. Here each owner-operator supplies certain power units by which some transportation for the company is accomplished and his own services as driver are ordinarily utilized by the company in combination with his own power equipment. Determination of who exercises control over the considered operations is between the owner-operator who owns one significant instrumentality of commerce (the power equipment) and is himself the other significant instrumentality (the driver), on the one hand, and, on the other, the company which owns the commodities transported (and the trailer utilized) and which by agreement attempts to "assume" certain responsibilities for and control of the operation involved. On the facts presented in this proceeding, and bearing

in mind that the basic issue for determination is whether a private or for-hire operation is being performed, under the described arrangements, we do not find that the company in practice has achieved such exclusive control of both instrumentalities of transportation as will rebut the presumption that the operation is one of for hire. Even if each owner-operator should be considered to be a bona fide employee of the company with respect to his driving duties, he does not lose his status as an indepedent contractor with respect to the equipment, and his own services as a driver cannot be considered to take from him and give to the company such control as would overcome the presumption stated in the *Church* case, *supra*. The close relationship between the owner-operator's status as a supplier of equipment and as an "employee" of the company cannot reasonably be denied. There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists. We are satisfied that the company does not have the exclusive right and privilege of controlling the transportation service considered.

Considering the primary question here in terms of whether any person is engaged, in substance, in for-hire transportation we point out that the decision in *Fleming Common Carrier Application*, 8 M.C.C. 469, 470, noted:

> We conclude that the methods followed by applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

From this language it is implied that for-hire transportation can be accomplished by a carrier which provides (1) all of the equipment moving, (2) the power equipment only, or (3) none of the equipment moving.[4] Here we are concerned with whether each owner-operator is, in substance, engaged in for-hire (whether common or contract) transportation by the truckaway method providing power equipment only.

Section 203(a)(15) of the act defines a "contract carrier by motor vehicle" in terms of engaging for compensation, in (*a*) the furnishing of transportation services through the assignment of motor vehicles for a continuous period of time to the exclusive use of each person served or (*b*) the furnishing of transportation services designed to meet the distinct need of each individual customer. Inasmuch as the motor vehicle equipment of each owner-operator is exclusively devoted to the company, the type of for-hire operation with which the operation described here should be compared is that of a contract carrier by motor vehicle.

Here each owner-operator assigns his motor vehicle for a continuing period of time to the exclusive use of the company, furnishing a service designed to meet the distinct need of the company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip

[4] The provision of (1) or (2) is sometimes described as the truckaway method and the provision of (3) is sometimes described as the driveaway method.

expenses.* In short, the only points of possible difference between the service here provided and conventional contract-carrier services are, (1) the company prefers to separate the functions of the owner-operator regarding him, insofar as the equipment is concerned, as a lessor, and, insofar as his driving services are concerned, as a company employee, (2) the company bears the cost of personal and property liability insurance upon the leased equipment, (3) the company bears the cost of cargo insurance, and (4) the company exercises certain control over the owner-operators as "employees." In *R.N.G. Commercial Auto Renters, Inc., Contr. Car. Applic.*, 73 M.C.C. 665, hereinafter called the *R.N.G.* case the Commission found that assignment of the driver to the vehicle, supervision of them as to their duties, instruction of them as to the delivery of the merchandise, and requirement of them to report their deliveries and to file delivery tickets or receipts, by the shipper, are natural concomitants of any contract-carrier operation devoted exclusively to the needs of a particular shipper. And, as stated in *Motor Haulage Co., Inc., Contract Carrier Application*, 46 M.C.C. 107, 117, there is no provision in part II of the act or in our rules and regulations thereunder which require that a contract carrier by motor vehicle shall provide protection for shipments moving on its vehicles. Further, in the *Pacific Diesel Rental Co.* case, *supra*, it was noted that in the last analysis a shipper's assumption of any of a carrier's responsibility to the public, in this day when such responsibilities readily can be passed on to insurers, is little more nor less

* In addition to the other costs which are set forth specifically here, there is in the case of each owner-operator a definite determinable deferred cost to the company to be paid the following year in the form of "vacation pay."

than a rate adjustment. Therefore (2), (3), and (4) above cannot be regarded as features of the service involved here which could distinguish it from contract-carrier service.

There remains the question of whether the company's separation of the functions of owner-operator is enough to change the basic character of the service performed by the owner-operator. In this connection the *Pacific Diesel Rental Co.*, case, *supra*, states:

> Pacific Diesel, alone, or in concert with one or more of the owner respondents, offers shipper respondents a service that differs essentially from conventional motor-carrier service only in that a particular shipper adopts and purports to employ the driver supplied for the duration of any transportation accomplished. In *Shields Extension of Operation—Alliance, Ohio*, 41 M.C.C. 100, the Commission, former division 5, found in a situation where applicant therein supplied equipment under lease accompanied, in some instances, by drivers who were paid by applicant and for whose service the shipper reimbursed applicant and, in other instances, by other drivers paid by shipper, that, in fact, such payment or reimbursement amounts to nothing more than additional compensation for applicant's service, supplementing the amount specified in the written contracts between applicant and shipper. Its conclusion was that such applicant's operations (somewhat comparable to those described herein) constitute carriage for hire subject to regulation under part II of the act. We are convinced here that, even if all the responsibilities of an employer with respect to the driver are assumed by a shipper, the service offered by Pacific Diesel, alone, or in concert with owner respondents, as appropriate, is, in substance, for-hire motor carriage subject to regulation under part II of the act. To hold otherwise would be inconsistent with

> the remedial purpose of part II and would be in contravention of our duty, imposed by Congress: (1) to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the act, (2) to foster sound economic conditions in transportation and among the several carriers, and (3) *to encourage reasonable charges* for the transportation service, *without* unjust discrimination, undue preferences or advantages, or *unfair or destructive competitive practices*. It is evident that were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress.

Actually, the basic difference between the facts in this case and those in that case is that the equipment owners there were acting in concert with Pacific Diesel Rental Co. Here, as there, we believe that it is evident that were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress. We are convinced that the owner-operator respondents here are, in substance, engaged in the business of interstate transportation of property on the public highways for-hire as contract carrier by motor vehicle.

In this record respondents make much of the fact that the company requires physicians' certificates, reports relative to the condition of the equipment utilized, and drivers' logs from the owner-operators. In *A A Auto Delivery, Inc., Common Carrier Application*, 77 M.C.C. 365, a similar point was considered, and it was said:

> In determining questions directed to the ascertainment of the identity of the one actually conducting a transportation operation, whether it be a carrier, a shipper, or other individual, we have consistently looked to the one who exercises or can exercise control and domination over such operation. In certain cases, where there exists the possibility of evasion of the act through subterfuge and the elements of direction, control, and domination appear to compel the conclusion that the transportation operations involved constitute private carriage by a shipper, we have also looked to the question of who is responsible to the public. In such cases we recognize that any responsibility as a carrier retained, by a lessor of equipment or a supplier of drivers, for the operation of the vehicle, the action of the operators thereof, or the safe delivery of cargoes is inconsistent with such private carriage by the shipper and that the shipper must accept complete responsibility for the entire operation. Compare *Scott Bros., Inc., Contract Carrier Application*, 32 M.C.C. 253. In instances, however, where, as here, one party holds out a transportation service which it accomplishes under its own direction and control whether by or through its agents or employees, responsibility to the public (including the shipper) for such service must be accepted by the party holding out and performing the service and any understanding or misunderstanding to the contrary by those concerned can be in no way determinative as to

the identity of who is actually conducting the considered transportation operations.

Although the company's requirements here tend to show that it, in good faith, is attempting to have the described arrangements conform to the practices of true private carriage and to abide by our safety regulation, such attempts are not determinative of whether the operations involved constitute private or for-hire carriage. Rather, the meeting of safety requirements is a duty which falls upon the actual carrier, whether private or for-hire, and the proper person to fulfill the safety requirements is a question secondary to determination of which person, in fact, is the carrier in the particular circumstances considered.

In summary, basically we have here a situation wherein a motor-carrier service is being performed through and by the use of owner-operators whose business is the performance of transportation for compensation. Concededly, without arrangements with respect to the complementary services neither the driver nor equipment services of the owner-operators, standing alone, could be found to be those of carriers for hire; but once the owner-operators enter into the compehensive arrangements here disclosed, they bring into life transportation services of which they are the essential and moving part. No longer then are they merely unengaged persons; rather they become actively and primarily engaged in motor-carrier services wherein they supply all the significant facilities for, and play the dominant role in, the provision of the actual transportation performed. In other words the company provides the traffic and the owner-operators provide the transportation for which they are compensated as carriers and not as bona fide members of the company's organization.

In view of our conclusion that the owner-operators are engaged in for-hire carriage, the question remains as to whether the company has, in concert with the owner-operators, participated in their operations to a sufficient extent that it can be found to have participated in the violations of the act. We believe that the record is convincing that, though the efforts of the company appear to have been directed to the accomplishment of private carriage partially exempt from regulation, it planned and fostered the method of operation of the for-hire carriers, relieved them of certain of the burdens of their for-hire transportation services, and otherwise participated in their violation of the act. A cease and desist order will be directed to the owner-operator respondents who are actually operating as for-hire carriers. It is noted, however, that the circumstances here are such that the described operations would not constitute a bar to our finding the owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy. Inasmuch as the cease and desist order directed to the owner-operators should result in discontinuance of the unlawful practices involved, it is deemed unnecessary at this time to direct any order to the company.

We find that Marion W. Daves, Henry E. Drum, N. C. Newman, A. D. Woodard, George F. Daves, Oscar Daves, Archie Norris, Eugene Wiggins, Charles W. McGee, Todd Shinn, and William M. Martin, severally, have been and are engaged in transportation of property, in interstate commerce for compensation, as contract carriers by motor vehicle, without appropriate authority, in violation of section 209(a)(1) of the Interstate Commerce Act.

An order will be entered (1) requiring respondents named in the preceding paragraph to cease and desist forthwith, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and (2) discontinuing the proceeding as to all other respondents.

COMMISSIONER WEBB, dissenting:

I am, and the respondents will be, puzzled by the rationale of the report in this proceeding. Archie Norris, Todd Shinn, and the other respondent owner-operators will be astonished to learn that they are contract carriers and not employees of the Oklahoma Furniture Manufacturing Co. Interspersed throughout the report are references to 15 indicia of private carriage not one of which is present in the typical contract carriage operation. The Oklahoma Furniture Manufacturing Co. (1) pays the owner-operators for driving; (2) deducts from their paychecks social security and Federal income taxes; (3) provides workmen's compensation benefits; (4) retains the right to hire and discharge drivers independently of the lease arrangement; (5) bargains with a labor union respecting the wages of owner-operators and other conditions of employment; (6) provides the trailer; (7) has exclusive control over the use of all transportation equipment; (8) assumes full responsibility for maintaining such equipment in first-class operating condition; (9) takes full responsibility for damage to cargo; (10) loads and dispatches the shipments; (11) issues detailed routing instructions; (12) issues no bill of lading; (13) keeps drivers' logs and medical certificates; (14) pays for public liability and property damage insurance, and (15) expressly

reverses to itself the exclusive right to control and direct the transportation service involved. It is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents.

The report lays down the following two tests:

> Determination of whether particular arrangements such as those involved here result in private operations by the lessee or for-hire operations of the lessor is dependent upon the answer to two questions; namely; (1) is the transportation here involved such that any person or persons other than the purported private carrier have any right to control, direct, and dominate it, and (2) are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire.

As I see it, the second test indicated for determining whether a for-hire operation is conducted by a lessor is whether or not the lessor is engaged in interstate transportation on the public highways for hire. The report thus appears to conclude by *ipse dixit* that respondents are violators of the Interstate Commerce Act. Further, the report in referring to the *Church* case, *supra*, and the rebuttable presumption of for-hire transportation which arises from a lease of equipment with drivers by a carrier to a shipper, has this to say:

> The presumption, as noted above, refers to the lessor of equipment as the "carrier," but it is clear that the presumption does not depend upon a prior determination that the "lessor" is a "carrier." Rather, it rests upon the lessor-lessee relationship between those involved and arises whenever any person or per-

> sons other than the purported private carrier leases equipment with drivers to a shipper.

The meaning of the statement just quoted is far from clear. In any event, all the ambiguities in the report are dispelled and the indicia of bona fide private carriage are swept aside by one statement of exceptional clarity:

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists.

No one can fail to grasp the significance of this sweeping pronouncement. It means plainly and simply, that no owner-operator can be employed by a common carrier, a contract carrier, or by a private carrier, if he rents and drives his own equipment unless, of course, he holds appropriate operating authority issued by the Commission. Thus, the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary. The report, while holding up the single element of "status" as the conclusive factor in determining who has the right to control and direct, is inconsistent in citing the *Church* case, *supra*, and the *R.N.G.* case, *supra*. The latter case contains the following statement:

> The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between applicant [lessor] and Gaylord [lessee], including particularly the actual practices in the conduct of the operation. No one element or circumstance is by itself conclusive. See *H. B. Church Truck Service Co. Com. Car. Application, 27 M.C.C. 191.*

In addition to its ominous implications, the report contains a few that are anomalous. For example, if Norris drives Shinn's tractor and Shinn drives Norris', both would probably be held to be engaged in private carriage. And this would be true even though all other aspects of the transportation service were identical to the arrangements condemned in this proceeding. Also, if a company driver owning no equipment drives Shinn's tractor and Shinn drives a company tractor, neither would be regarded as performing a for-hire service.

The report recognizes the harshness of its ultimate conclusion. Respondents are invited to apply for contract-carrier authority and are informed that the operations interdicted by the report will not preclude a finding of fitness. If the respondents construe this as any implied promise to grant contract-carrier authority they may be disappointed. Contract-carrier application proceedings must also consider an applicant's financial fitness and the factor of existing motor-carrier service.

At the core of this decision is the false assumption that Archie Norris and Todd Shinn and the other respondents lease equipment with drivers to the shipper. They do no such thing. They offer their own services as employees and receive additional compensation because they themselves supply an expensive tool. This kind of employer-employee arrangement was far more common a century ago, but it has by no means disappeared from the contemporary economic scene. The cases cited in the report in support of the cease and desist order involved a person or firm who employed drivers, who owned equipment, and who made both available to the shipper or carrier, often under some subterfuge arrangement. Respondents here own equipment, do

not employ drivers, make equipment available to the furniture company, and offer their services as employees of the company.

I have no doubt whatever concerning the laudable motives which inspired the conclusion reached in the report. There is an understandable desire to promote the economic well-being of for-hire carriers and a natural reluctance to permit a private carrier to divest itself of any of the inherent disadvantages of that mode of transportation. The impact of this decision on the Oklahoma Furniture Manufacturing Co. is negligible. It can buy respondents' tractors or it can rent tractors from a truck rental firm and pay respondents $50 a week plus 2 cents a mile for driving instead of 5 to 6 cents a mile for driving their own tractors and 10 to 14 cents per mile rental.

If, as I imagine, there is a fairly high turnover of owner-operators serving a particular shipper or carrier, it is conceivable that thousands of applications would be filed with the Commission as a result of nationwide application of the novel rule of law enunciated in the report. However, this possible administrative nightmare is considerably less important than the unwitting, but nevertheless devastating blow which this report delivers to the property rights of numerous small entrepreneurs, as no doubt the tractors of many of the owner-operators involved in this proceeding were purchased at a considerable financial sacrifice. I am unable to find any justification for such a result either within the broad framework of the national transportation policy or within the interstices of part II of the Interstate Commerce Act. Therefore, I cannot impose upon respondents here and others in a similar position what appears to me to be a legally unsupportable sentence of economic excommunication.

I would discontinue the proceeding.

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